CLEC CRITICISMS OF THE *UNE FACT REPORT 2004* ARE MISPLACED

This White Paper addresses various CLEC criticisms of the *UNE Fact Report 2004* ("*Fact Report*").

As in the past, the CLECs have failed to provide any serious data of their own – no real details about their networks, customers, revenues, or their use of alternative providers, including ILEC special access – despite the fact that these carriers obviously have unique access to such data. Incumbent LECs have accordingly been forced to rely largely on indirect sources for their information about competing carriers. In particular, the *Fact Report* has relied on public sources, such as the CLECs' own statements to investors and customers, Wall Street and other industry analysts, and other independent public sources.

Rather than present affirmative data of their own, the CLECs concentrate on disputing the evidence that the ILECs have presented, including the *Fact Report.* In general, the CLECs' criticisms of the *Fact Report* boil down to a few isolated instances where they claim the public sources on which the *Fact Report* relied are at odds with the assertions of CLECs' own declarants. For the most part, however, the CLECs either misrepresent what the *Fact Report* said or misinterpret the underlying sources on which it relied. And even taking the CLEC claims at face value, they in no way rebut the *Fact Report's* comprehensive showing, which demonstrates that there is extensive and rapidly growing competition for both high-capacity and mass-market services.

I. High-Capacity

A. Extent of Competitive Fiber Networks Generally

The *Fact Report* demonstrated that competing carriers have deployed at least one network in at least 140 of the 150 largest MSAs nationally; an average of nearly 20 networks in each of the top 50 MSAs nationally; and that these networks consist of approximately 324,000 route miles of fiber nationally.[1] Although CLECs quibble with a few aspects of this showing, they provide no serious data of their own – not a single CLEC has submitted maps of its fiber network, a list of the cities its networks serve, or any details about the scope and capabilities of its network in each respective area. While several CLECs provided some high-level statistics about their networks, those data are largely consistent with the data presented in the *Fact Report*.[2] And to the extent that CLECs do identify some discrepancies, they are few in number, and do not come close to rebutting the *Fact Report's* overall showing.

[1] *See Fact Report* at III-3 to III-4 & Table 1.

[2] The 12 competing carriers that operate fiber networks and that have filed comments report serving a total of 24,300 local fiber route miles. *See* Loop & Transport at 6; MCI at 32. In addition, AT&T publicly reports that it serves at least 21,000 local fiber route miles. *See 2004 Fact Report* at III-4, Table 1. The route miles provided in the *Fact Report* are consistent with the totals provided by each of these carriers. *See id.*

First, AT&T claims that nearly half of 324,000 fiber route miles that competing carriers have deployed are "undocumented and unsupported."[3] This total was derived from Table 16 of NPRG's *CLEC Report 2004*, which is the same source on which ALTS itself relies for statistics on CLEC facilities.[4] That table lists the fiber route miles for 35 CLECs on one page, and on a second page states that "other" competitive providers – "CIOCs, Utility CLECs, Data Providers, Gig-E Providers, Fiber Layers, Other" – which the report does not separately identify, account for an additional 130,000 fiber-route miles.[5] AT&T's mistake is that it simply didn't bother to turn the page.

Second, a few CLECs claim that the fiber route mile totals include some intercity miles.[6] The *Fact Report* was entirely candid about that fact, which cannot be helped given that most CLECs (all but eight) refuse to provide their local-only fiber route miles publicly, and have withheld such data in their filings here as well. Where such totals were available, the *Fact Report* supplied them – for example, AT&T alone operates more than 21,000 local fiber route miles, while Time Warner Telecom operates over 12,000.[7] In addition, several of the BOCs also provided detailed fiber maps for their MSAs where high-capacity demand is most heavily concentrated, and these maps confirm beyond dispute that much of the fiber that competing carriers have deployed is local.[8]

Third, NuVox claims that, although it was listed as having fiber in 17 of the top-50 MSAs, neither it nor NewSouth (which NuVox has acquired) has "deployed any of their own fiber."[9] NuVox admits, however, that "NuVox utilizes third-party providers for backhaul from NuVox collocation arrangements to NuVox switches"; that it "has contracts with a number of third party vendors to provide this transport"; and that "[a]t least one third-party provider has built into *all but one* of NuVox's switching locations, and, at a handful of NuVox's switching locations, two or more third-party providers have built into NuVox's switching locations."[10] Thus, in virtually all cases, NuVox is relying on competitive fiber, at least in part, in the markets where it provides service. There is no rational economic basis on which to distinguish between competing carriers that have deployed their own fiber, and those that have chosen to rely on other competitive suppliers. In any event, the data still show that there are multiple competitive fiber suppliers in each of the top-50 MSAs, even excluding NuVox and NewSouth's leased fiber.

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[3] AT&T Selwyn Reply Decl. ¶ 14.

[4] *See, e.g.*, ALTS, *The State of Local Competition 2002* at 17 (Apr. 2002) (citing NPRG as the source for route miles statistics) (cited by the FCC, *see TRO* ¶ 39 n.125).

[5] The *CLEC Report* provided fiber route miles for 11 individual CLECs that the *Fact Report* included in the "other" category – boosting the "other" total from 130,000 to 165,000 – based on the fact that these carriers did not appear to be providing high-capacity services to business customers. Those CLECs are RCN, Paetec, Knology, Allegiance, Conversent, Everest, FDN, Sun West, Orlando Telephone, General Communications, and Advanced Telecom Group. *See Fact Report* at III-4, Table 1 & Appendix H.

[6] *See, e.g.*, Sprint Reply at 34; McLeod Reply at 8; AT&T Selwyn Reply Decl. ¶ 28.

[7] *2004 Fact Report* at III-4, Table 1.

[8] *See* Verizon Comments, Attachment H; SBC Comments, Attachment C.

[9] Nuvox Reply at 3.

[10] NuVox Coker Decl. ¶ 3.

Fourth, while the *Fact Report* indicated that Cavalier operated networks in eight MSAs, Cavalier claims that it has no networks in two of those MSAs (Harrisburg and Lancaster), and that its only high-capacity facilities in a third (Trenton) are leased from Verizon.[11] The source on which the *Fact Report* relied (New Paradigm's *CLEC Report*) has proved reliable in all but a few isolated cases – such as this one, apparently.[12] Cavalier claims that in some MSAs where it operates its own networks it also relies on dark fiber UNEs, but Cavalier provides no supporting numbers. Cavalier's operations are in Verizon's region; all competing carriers combined have obtained a total of only 936 unbundled dark fiber transport facilities and only 50 unbundled dark fiber loops from Verizon region wide.[13]

B. Use of Competitive Networks to Provide High-Capacity Loops

The *Fact Report* demonstrated that competing carriers were using their networks extensively to provide high-capacity loops. Competing providers themselves report that they are providing *direct* fiber connections to approximately 32,000 known office buildings, with *several hundred thousand* additional buildings receiving *indirect* connections, where the building connects to a CLEC's fiber ring via a facility leased from an alternative provider or special access obtained from an ILEC.[14] One wholesale provider promotes the fact that it has access to over half a million buildings.[15] The *Fact Report* also demonstrated that based on data they report, competing carriers are providing approximately 156 million voice-grade equivalent lines to enterprise customers, the majority of which are high-capacity lines, and that approximately 88 million of those lines appear to be enterprise lines provided over competitors' own loop facilities.[16]

A few parties speculate that the 32,000-building total reflects double counting where multiple CLECs serve the same building.[17] But in fact, the total is probably far too low – it reflects reports of buildings served from only 16 CLECs – only a fraction of CLECs known to operate fiber networks.[18] And in any event, the CLECs that challenge the 32,000-building total provide no data relating to the specific buildings they serve, nor do they cite a single actual instance of double counting. Only one CLEC (McLeod) even asserts that its buildings-served

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[11] Ex Parte Letter from Stephen Perkins, Cavalier, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338, at 5-6 (Nov. 5, 2004) ("Cavalier 11/5/04 Ex Parte"); *see Fact Report* at Appendix D.

[12] Cavalier also complains that while they do have networks in five MSAs which we cite, there is only one MSA (Richmond) where it does not heavily rely on UNE dark fiber and IOF transport. In all five cases, however, Cavalier admits to operating their own high-capacity networks – which in some cases include "a substantial amount of [Cavalier's] own fiber." Cavalier 11/5/04 Ex Parte at 5.

[13] *See* Verizon Lataille/Jordan/Slattery Reply Decl. ¶ 49.

[14] *See Fact Report* at III-3 to III-4 & Table 1.

[15] *See id.* at III-19 to III-20.

[16] *See id.* at I-8 to I-9.

[17] *See* Ex Parte Letter from Brad Mutschelknaus, Loop/Transport Coalition, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338, at 7 (Oct. 18, 2004) ("Loop/Transport Coalition 10/18/04 Ex Parte"); ALTS Reply at 26.

[18] *See Fact Report* at III-3.

total differs from the figures on which the *Fact Report* relied.[19] Whatever the precise total, there is no dispute that CLECs are serving large numbers of buildings directly with their own fiber, and an even greater number of buildings indirectly using leased facilities.

The Loop/Transport Coalition claims that the *Fact Report* substantially overstates the total number of CLEC-provided end-user lines.[20] The Coalition's argument boils down to the assertion that CLECs report higher numbers to financial regulators and to the public in their earnings statements than they do to this Commission on their 477 forms.[21] As the Commission itself has already noted, the form 477 data do not include lines that competing carriers serve using a combination of their own facilities and leased facilities, including leased special access lines.[22] More than two-thirds of BOC special access revenue comes from sales to other carriers, so CLECs are almost certainly serving a very substantial number of lines using resold special access.[23]

As for the number of lines that CLECs serve entirely over their own facilities, the Commission's form 477 instructions require a CLEC to report only the number of "voice telephone service" lines it serves; CLECs, however, use their networks mainly to provide data services.[24] The *Fact Report* estimated the total number of voice and data lines served by subtracting the number of lines that CLECs serve using ILEC facilities, including special access, from the total number of lines that CLECs report serving.

C. Use of Competitive Networks to Provide High-Capacity Transport

The *Fact Report* demonstrated that competing carriers have connected their extensive fiber networks to all major traffic aggregation points, including ILEC wire centers, and are therefore able to provide transport using those networks.[25] The *Fact Report* further demonstrated that competing carriers have obtained fiber-based collocation in 55 percent of the wire centers that account for 80 percent of BOC special access revenue, including 53 percent of all wire centers with 5,000 or more business lines.[26]

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[19] McLeod claims to serve "546 business customer locations," not 1,500 buildings as reported in the *Fact Report*. *See* McLeod Reply at 9. This admission by McLeod puts the lie to AT&T's claim that McLeod does not serve any buildings using its own network. *See* AT&T Selwyn Decl. ¶ 39.

[20] Loop/Transport Coalition 10/18/04 Ex Parte at 3; *see also* Loop/Transport Coalition Reply at 36-37; MCI Reply at 90.

[21] Loop/Transport Coalition 10/18/04 Ex Parte at 3; *see also* Loop/Transport Coalition Reply at 36-37; MCI Reply at 90.

[22] *See Triennial Review Order* ¶ 300 n.872 ("[T]he Commission has instructed competitive carriers to exclude local services provisioned over special access facilities in their reported data.").

[23] *See Fact Report* at I-8 to I-9.

[24] According to the *2004 CLEC Report*, CLECs earned $27 billion in data and dedicated access/private line revenues in 2003, compared to $16 billion in switched local services. *See* New Paradigm Resources Group, Inc., *2004 CLEC Report*, Ch. 3 at Table 11 (18th ed. 2004).

[25] *See Fact Report* at III-9 & Table 6, III-29.

[26] *See id.* at III-8 & Table 5, III-29 & Table 17.

No CLEC disputes any of these facts. Based on this showing, however, the Loop/Transport Coalition claims that the *Fact Report* "concede[s] that a single CLEC must be collocated on both ends of a route to have potential transport competition."[27] The *Fact Report* asserts precisely the opposite. A single CLEC does *not* have to have its own fiber running end to end; competing carriers can interconnect with each other, and routinely do so.[28] And moreover, fiber-based collocation is a very conservative measure of transport competition, because a great deal of competitive fiber bypasses ILEC wire centers completely.[29]

D. Use of Competitive Networks to Provide Wholesale Services

Although it is not relevant to the impairment analysis whether or not competing providers offer service on a wholesale basis, the *Fact Report* demonstrated that competing carriers have both the incentive and ability to offer capacity on their fiber networks on a wholesale basis, and that large numbers of competing carriers are in fact doing so. The *Fact Report* demonstrated that more than 30 competing facilities-based fiber optic carriers are actively marketing wholesale high-capacity services.

Several parties suggest that these marketing materials cannot be trusted; the CLEC may not provide the wholesale services it markets over its own fiber network, or may not offer the services over all of the separate fiber networks that it operates.[30] But the carriers making these claims fail to provide any specific data to support any different inference – not a single CLEC has provided information detailing where it offers services on a wholesale basis, or where it obtains services from alternative providers.[31] At least five members of the Loop/Transport Coalition admit to purchasing high-capacity services from competitive suppliers, but none provides any further details.[32] ALTS provides two examples of CLECs that provide wholesale services over a combination of their own networks and ILEC facilities,[33] but two such isolated examples establish only that CLECs can indeed provide wholesale services when they want to.[34]

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[27] Loop/Transport Coalition 10/18/04 Ex Parte at 16.

[28] *See Fact Report* at III-16 to III-19 & Table 12, III-29.

[29] *See id.* at III-28.

[30] *See, e.g.*, Cavalier 11/5/04 Ex Parte at 3; Ex Parte Letter from Jason Oxman, ALTS, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338, at 3 (Nov. 8, 2004) ("ALTS 11/8/04 Ex Parte").

[31] Cavalier claims it offers wholesale lit services only on certain parts of its network, not in each the MSAs where it operates fiber networks, but fails to specify which portions those are. Cavalier also claims it offers dark fiber only on certain parts of its network – in the 2 MSAs where it obtains fiber from City Signal – not in the 6 other MSAs where it operates fiber. But the fact that Cavalier is offering wholesale services in some MSAs, and on some parts of its networks, is solid evidence that it and other CLECs can provide wholesale services anywhere they operate competitive fiber, which is what dozens of competitive providers are in fact doing.

[32] *See* Loop/Transport Coalition 10/18/04 Ex Parte at 13.

[33] *See, e.g.*, ALTS 11/8/04 Ex Parte at 2-3.

[34] Verizon demonstrated that when it enters out-of-franchise markets, it routinely relies on other competing carriers, rather than the ILEC, as its principal supplier. *See* Verizon Comments at 40-41 & Cuddy Decl. ¶¶ 4-19.

A few CLECs take issue with the *Fact Report's* analysis of networks operated by fiber wholesalers. The *Fact Report* stated that the very limited data made public by five of nine fiber wholesalers, addressing some but not all of the markets they serve, indicate that fiber wholesalers operate at least 19,000 route miles of fiber that connect to at least 3,000 buildings directly with their fiber.[35] The Loop/Transport Coalition attempts to recharacterize this lower-bound estimate as a firm total.[36] The universe of buildings where wholesale fiber is already, or readily could be, made available is in fact much larger. As the *Fact Report* demonstrated, many CLECs offer wholesale services on their fiber, and all of them could.[37]

AT&T also makes a number of (largely speculative) claims about the fiber wholesalers, but it provides no basis to disregard any aspect of the *Fact Report's* showing:

- AT&T claims the 1.4 million metro fiber miles reported by AboveNet appears to include fiber in foreign cities.[38] The *Fact Report's* 19,000-route-mile total does not in fact include any of AboveNet's route miles; the figure is highly conservative.

- AT&T speculates that some of the 10,000 route miles reported by LightCore include fiber operated by LightCore's ILEC parent company, CenturyTel.[39] But LightCore was originally formed from one of the early competitive access providers (Digital Teleport), and states that since becoming LightCore, it "has added nearly 3,000 miles of new fiber optic network across an expanded footprint that now includes 11 states."[40] CenturyTel's fiber does not therefore appear to be included in the total.

- AT&T claims that the *Fact Report* improperly assumes that NEESCom and OnFiber directly connect to the buildings these carriers claim they "pass" or "reach."[41] NEESCom and OnFiber do not provide information to resolve this ambiguity, but both make clear that their networks do in fact connect directly to many individual buildings.[42]

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[35] *See Fact Report* at III-5 & Table 2.

[36] Loop/Transport Coalition 10/18/04 Ex Parte at 8 (emphasis added).

[37] *See Fact Report* at III-14, Table 9.

[38] AT&T Selwyn Reply Decl. ¶ 27.

[39] *Id.*

[40] LightCore, *About Us*, http://www.lightcore.net/company_au.php.

[41] AT&T Selwyn Reply Decl. ¶ 27.

[42] NEESCom, *NEESCom Metro Rings*, http://www.gridcom.com/neescom/prod_servc/metro/index.htm (For Providence, NEESCom states that its "Capitol Ring" provides "access to the R.I. State Capitol and municipal facilities, large downtown office complexes and the emerging Cyber District at The Foundry" and its "Providence Hub Ring" "extends through the heart of the downtown business and financial district and to several major academic institutions. The Ring provides access to the ILEC Central Office."); *id.* (For MetroWest, NEESCom states that it "has constructed 4 Metro rings throughout the region designed to provide access to many of the[] leading firms. Companies along the NEESCom MetroWest Rings include EMC2 , 3COM, Compaq, Genzyme, Computer Associates, Bose, Fidelity Investments, State Street Bank, USDataCenters and Staples Corporate headquarters and the Staples Data Center."); OnFiber, *About/Overview*, http://www.onfiber.com/interior.asp?section=about. ("OnFiber connects the metro core network to the metro access network, which extends a direct fiber connection to enterprise businesses and commercial buildings via its unique HomeRun FiberSM architecture.").

- AT&T claims that NEON does not serve end-user locations. But the very source that AT&T cites claims that NEON will "source" local loops for a customer; "will work with building managers or other real estate professionals to provide custom builds at specific, larger locations"; and "will consider providing Local Loop on an individual, case-by-case basis."[43] And while AT&T correctly notes that the Building List on NEON's website also includes some buildings that do not house end users (such as BOC central offices), a simple search of the Yellow Pages flatly contradicts AT&T's claim that "none of these buildings are end user customer locations."[44]

E. Additional Competition From Cable and Fixed Wireless

The *Fact Report* demonstrated that a large and growing number of businesses are also obtaining high-capacity services from cable companies and fixed wireless providers. Cable operators now provide service to business customers in at least 90 MSAs; they also report that their networks already reach millions of potential enterprise customers, and that the networks are being extended rapidly to reach still more.[45] Fixed wireless providers are now operating in nearly 75 MSAs, and fixed wireless spectrum is being sold on a wholesale basis in each of the top 150 MSAs.[46] Many CLECs are now using fixed wireless to expand their fiber networks.[47]

AT&T insists it can find "no indication" that cable operators are offering high-speed services "directly . . . to retail enterprise customers,"[48] because the "only business offerings" mentioned on the major cable operator's websites are "high-speed Internet access services."[49] AT&T has consulted the wrong websites. As the *Fact Report* made clear, the cable operators have set up CLEC affiliates to offer high-capacity services to enterprise customers. These include Lightpath, Cox Business Services, and Comcast Commercial Services, each of which has its own separate website devoted to business services. As these websites indicate, all of the major cable operators do indeed offer high-capacity services directly to enterprise customers, including smaller businesses.[50] Recent data show that cable operators continue to expand their

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[43] NEON Communications, *Frequently Asked Questions*, http://www.neoninc.com/page.cfm?contentID=429.

[44] AT&T Selwyn Reply Decl. ¶ 27. AT&T's mistake here is that it assumes that buildings that house telecom facilities and carrier hotels do not also house end-user customers, but they clearly do. For example, NEON has facilities at 601 West 26th Street and 25 Broadway in New York City, both of which appear to house individual businesses, according to Superpages listings for these addresses. *See* Verizon Superpages, www.superpages.com.

[45] *See Fact Report* at III-25, III-36 to -III-38 & Table 19.

[46] *See id.* at III-20 to III-24, III-36.

[47] *See id.* at III-24, Table 15.

[48] AT&T Selwyn Reply Decl. ¶ 21.

[49] *Id.*

[50] *See* Cablevision Lightpath, http://www.lightpath.net/ ("Since 1988, Lightpath has delivered voice, data, Internet, and video solutions for businesses of every size and complexity."); Cox Business Services, http://www.coxbusiness.com ("Cox Business Services delivers a wide range of advanced broadband-based communications services: High-speed Internet access, Local and long distance telephone, Advanced voice and data transport solutions."); Comcast Commercial Services, *Services*, http://www.comcastcommercial.com/index.php?option=content&task=view&id=6&Itemid=27 ("Comcast is the smart choice for your business. Whether it's Internet

business operations. For example, Cablevision Lightpath's third quarter 2004 earning statement attributes its 20 percent increase in revenues in large part to "an increase in data revenue from Optimum Online for business customer growth."[51] Cox's third quarter results likewise report an "increase in Cox Business Services customers."[52] And Charter reports that "[t]hird quarter commercial services revenues increased 27%."[53]

AT&T also claims that "fixed wireless technology faces significant hurdles" and is still in its "infancy."[54] But where this technology is headed is just as relevant as where it is now, and the evidence overwhelmingly shows that the availability and use of the technology is growing rapidly. AT&T's own Chief Technology Officer recently stated that AT&T is beginning trials of fixed-wireless in two cities and that it views this technology as a way to connect to 100,000 business locations nationwide.[55] On November 12, 2004, TowerStream launched WiMax-based fixed wireless service in Los Angeles and announced that it will deploy a network in San Francisco in 2005.[56] TowerStream notes that CPE costs for its service have recently dropped several hundred dollars (to $200 to $300), making the service affordable to high-end small office-home office customers.[57] Intel has announced plans to invest $150 million in WiMAX and WiMAX-related products.[58] This includes an investment in Clearwire, a fixed wireless company founded by cellular pioneer Craig McCaw, which has already launched commercial service in at least one market, and plans to deploy service in as many as 20 markets by 2005.[59]

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access for remote employees or the entire office; or even a multi-site wide area data network, Comcast supports your growing demand for networking services.").

[51] Cablevision News Release, *Cablevision Systems Corporation Reports Third Quarter 2004 Results* (Nov. 9, 2004).

[52] Cox Press Release, *Cox Communications Announces Third-Quarter and Year-to-Date Financial Results for 2004* (Oct. 27, 2004).

[53] Charter Press Release, *Charter Reports Third Quarter 2004 Financial and Operating Results* (Nov. 4, 2004).

[54] AT&T Selwyn Reply Decl. ¶ 20.

[55] *See* E. Schwartz, *The World According to AT&T*, InfoWorld (Nov. 19, 2004), http://www.infoworld.com/article/04/11/19/47OPreality_1.html (citing interview with Hossein Eslambolchi, CTO, AT&T) ("In 12 to 18 months, AT&T will run trials in two undisclosed cities to use WiMax for the last-mile connection to customers. AT&T has identified approximately 245,000 buildings within the United States that house business customers. AT&T is directly connected to 7,000 of those. WiMax in particular will be a way to connect to the next 100,000, Eslambolchi said.").

[56] TowerStream Press Release, *TowerStream Launches First Point-of-Presence on Top of Aon Center in Los Angeles* (Nov. 12, 2004).

[57] G. Blackwell, *TowerStream: Getting it Right the Second Time*, ISP-Planet (Oct. 26, 2004), http://www.isp-planet.com/fixed_wireless/business/2004/towerstream_grows.html.

[58] Intel Press Release, *Intel, Clearwire to Accelerate Deployment of WiMAX Networks Worldwide* (Oct. 25, 2004).

[59] Clearwire Press Release, *McCaw Led Clearwire Launches Commercial Wireless Broadband Services in Jacksonville* (Aug. 26, 2004); Clearwire Press Release, *Clearwire Launches Coverage in East Arlington and the Beaches* (Oct. 25, 2004); Clearwire, *Set Up Your Internet Connection in Any Room*, http://www.clearwire.com/service/homeplug.html.

II. Mass Market

The *Fact Report* demonstrated that technological and market developments have enabled competing carriers to use packet switches, broadband loops, and wireless networks to provide mass-market voice services that are comparable to conventional circuit-switched service in quality, functionality, and price. Cable companies now offer circuit-switched telephony to about 15 percent of all U.S. households, and among those households, almost 1 in 5 already subscribe.[60] By the end of 2004, cable companies will be offering voice-over-IP services to nearly a quarter of all U.S. households, and to more than 80 percent within two years.[61] Other voice-over-IP providers, including established companies like AT&T and upstarts like Vonage, are currently offering voice-over-IP services to an even greater number of households.[62] Wireless carriers are aggressively competing for both lines and traffic: the number of wireless lines has grown from 129 million to 161 million since the *Triennial Review*, while the number of wireline lines has declined.[63] The percentage of users giving up their landline phones has grown from 3-5 percent to 7-8 percent; and wireless traffic has grown from 16 to 29 percent of all voice traffic and to 43 percent of long-distance traffic.[64]

For the most part, competing carriers do not take issue with any of these numbers; they argue instead that the numbers aren't relevant to the Commission's impairment inquiry.[65] Significantly, however, one of the principal proponents of the view that intermodal competition should be ignored – MCI – has recently contradicted that view entirely.[66] In a brief that MCI recently filed with the California PUC, MCI acknowledges that "traditional wireline carriers are now facing competition, not just among themselves and from wireless carriers, but from non-traditional carriers, such as cable companies, VoIP providers, and soon even voice applications offered by other providers such as ISPs."[67] According to MCI, "[c]onvergence and the proliferation of broadband services are ushering in a new era in communications, in which traditional carriers and nontraditional voice application providers compete for customers (both consumer and business)."[68] Regulators accordingly "need to see communications as a broader

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[60] *See Fact Report* at II-1.

[61] *See id.* at II-4 to II-7.

[62] *See id.* at II-5, Table 2.

[63] *See id.* at II-29, Table 8.

[64] *See id.*

[65] *See* ALTS 11/8/04 Ex Parte at 6.

[66] *See* Ex Parte Letter from Dee May, Verizon, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338 (Nov. 16, 2004).

[67] *See* MCI, Inc.'s Opening Comments on Assigned Commissioner and Administrative Law Judge's Ruling Inviting Comments Regarding the Scope and Schedule of Phases 3A and 3B, *Order Instituting Rulemaking on the Commission's Own Motion To Assess and Revise the New Regulatory Framework for Pacific Bell and Verizon California Incorporated*, Rulemaking 01-09-001, Investigation 01-09-002, at 7 (CA PUC filed Nov. 4, 2004) ("MCI California Brief").

[68] *Id.* at 13.

market in which many traditional and nontraditional players participate."[69] These "recent technological, regulatory, and market developments in the telecommunications industry" "justify substantial relaxed regulation," both "for the dominant ILECs" as well as "for all market participants."[70]

ALTS claims that the large and rapidly increasing competition provided by VoIP "depends on the existence of a broadband connection."[71] As the *Fact Report* demonstrates, VoIP service is now price competitive with traditional service for most consumers, even taking into account the price of the broadband connection itself.[72] And the price of both broadband[73] and VoIP service[74] have both continued to drop since the *Fact Report* was completed. As the *Fact Report* also demonstrated, and as the Commission has since reaffirmed, the provision of broadband services is highly competitive.[75] In particular, the Commission found that "cable modem providers control a majority of all residential and small-business high-speed lines," and there also are "numerous emerging broadband competitors."[76] The Commission has accordingly "reject[ed] the assertions" that competing carriers repeat here – that "BOCs either are not subject to competition with respect to their broadband offerings, or are constrained only by a duopolistic relationship with cable operators."[77]

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[69] *Id.* at 12.

[70] *Id.* at 3.

[71] ALTS 11/8/04 Ex Parte at 8; *see also* Cavalier 11/5/04 Ex Parte at 2; M. Pelcovits & K. Baseman, *The Promise of VoIP: Let Them Eat Cake from the Only Two Bakeries in Town* at 8-9 (Nov. 2004), *attached to* Ex Parte Letter from Curtis Groves, MCI, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338 (Nov. 16, 2004) ("Pelcovits/Baseman Paper").

[72] *See Fact Report* at II-19 & Table 5.

[73] *See, e.g.*, V. Shvets, *et al.*, Deutsche Bank, *Broadband Wars v. 3Q04 … Cable Back on Top* at 3 (Nov. 16, 2004) (DSL providers "cut prices yet again, exemplified by BellSouth's lowering its basic DSL package prices by $7/month across the board, with the first six months at $9.95 in certain circumstances . . . Over the last few weeks, SBC has also introduced more aggressive introductory pricing."). Cable operators have also lowered their cable broadband prices moderately. *Compare* J. Atkin, RBC Capital Markets, *Cable/RBOC/DBS: Telephony, Data and Video Pricing Comparisons* at Exh. 2 (Feb. 3, 2004) (estimating average price of cable modem service at $50) *to* V. Shvets, *et al.*, Deutsche Bank, *Broadband Wars v. 3Q04 … Cable Back on Top* at 2 (Nov. 16, 2004) (Cable modem "entry points of $40-45 per month.").

[74] *See, e.g.*, Vonage Press Release, *Vonage Upgrades Local Calling Unlimited Calling Plan to Premium Unlimited Plan* (Oct. 1, 2004) (Lowering price of unlimited calling plan from $29.99 to $24.99); AT&T News Release, *AT&T Introduces New Residential VoIP Plan* (Oct. 14, 2004) (Introducing an unlimited local plan for $19.99, with local toll and long-distance calling in the US and Canada for only 4 cents per minute); J. Wrolstad, *EarthLink Offers Free VoIP*, NewsFactor (Oct. 6, 2004), http://www.newsfactor.com/ story.xhtml?story_title=EarthLink-Offers-Free-VoIP&story_id=27392&category=trends (EarthLink is offering free VoIP "to the company's million-plus EarthLink broadband customers.").

[75] *See Fact Report* at II-2 & Appendix A.

[76] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, WC Docket No. 01-338, ¶ 22 (FCC rel. Oct. 27, 2004) ("*271 Forbearance Order*").

[77] *Id.* ¶ 29; *see* ALTS 11/8/04 Ex Parte at 8. Cavalier claims that while its VoIP affiliate, Phonom, does currently "serve some of its [VoIP] customers over cable broadband connections, Phonom has no guarantee of continued access to those customers." Cavalier 11/5/04 Ex Parte at 2. But there is no basis to substitute speculative concerns with the facts today, which show that cable has a policy of "network neutrality" and that access is unrestricted. *See Fact Report* at II-2. Moreover, the Commission has found that, given the intense competition for broadband

MCI has submitted an analysis purporting to show that VoIP is more expensive (and lower in quality) than traditional wireline service when the price of the underlying broadband connection is taken into account.[78] But MCI's recent California filing argued that emerging technologies such as VoIP "are for all intents and purposes substitutable and virtually indistinguishable" from traditional service, and "compete directly" against it.[79] In any event, MCI's latest analysis is hopelessly flawed.

- Whereas the *Fact Report* compared the prices for bundles of unlimited local and long distance service offered by circuit-switched, cable, and VoIP providers, MCI replaces the circuit-switched bundles ($50-$60) with the lower amount that the average customer nationwide spent on local and long distance voice ($47). This lower total reflects average local and long distance minutes of use, whereas the bundles that most carriers now offer (and that consumers increasingly purchase) permit much higher minutes of use. MCI's approach therefore destroys the apples-to-apples comparison.[80]

- MCI eliminates taxes from the circuit-switched offering, claiming "they are already included in the estimate for voice service reported by the FCC."[81] But the taxes on circuit-switched services are higher than those on cable and VoIP service; the $5.50 - $13 tax totals included in the *Fact Report's* analysis represent only that *difference*. MCI's revised analysis suggests that cable and VoIP providers pay higher taxes than circuit switched providers; this gets things exactly backwards.

- MCI assumes the cost of cable broadband is $40 to $58, not $42 to $50 as the *Fact Report* claimed. But the average revenue per cable modem user – which reflects the routine promotional and other non-standard offerings – is now $40.67 per month, and projected to fall to $39.23 in 2005 – well below the figure used in the *Fact Report's* analysis.[82] And the ARPU for each of the largest cable operators is below $42 per month.[83]

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services, broadband providers have strong incentives "to find ways to keep traffic 'on-net,' which we conclude would likely include the provision of wholesale offerings." *271 Forbearance Order* ¶ 26.

[78] Pelcovits/Baseman Paper at 11-15.

[79] MCI California Brief at 12-13.

[80] For the same reason, MCI is wrong to add $2 for international calling to the cable and VoIP offerings, but not to the circuit-switched offering. In any case, its uncited assumption – ten minutes a month of international calling at 20 cents per minute – assumes prices much higher than cable and VoIP providers routinely offer. *See, e.g.*, Vonage, *International Rates*, http://www.vonage.com/intrates.php (Typical international long distance rates for most large, developed countries range between 4 and 19 cents a minute.).

[81] Pelcovits/Baseman Paper at 14.

[82] A. Bourkoff, *et al.*, UBS, *High-Speed Data Update for 3Q04* at 5 (Nov. 15, 2004).

[83] *Id.* at 7 (Charter ARPU: $35.68; Comcast ARPU: $42.91; Cox ARPU $40.92; Cablevision ARPU: $41.97; Time Warner ARPU: n/a).

- MCI adds $3 to the cable and VoIP price to reflect the cost of renting a cable modem, but this is already factored in to the average price of high-speed Internet access service used in the *Fact Report*, and into the average ARPU noted above.[84]

- MCI claims that VoIP is not economical for homes that do not currently subscribe to any Internet access service,[85] but it simply ignores the fact that cable operators have already begun to offer bare-bones service to such customers for as little as $12-$14 per month. As the *Fact Report* explained, these offerings reflect the fact that *incremental* costs of providing broadband are lower than *average* costs for broadband; broadband providers can price broadband transport at marginal cost for the relatively few customers who will use the capacity only for barebones voice service.[86]

ALTS attempts to downplay competition from cable operators, noting that "only 2%, and in limited markets perhaps to 8%, of all consumers have subscribed to cable circuit-switched voice services."[87] But cable-provided circuit-switched phone service is *available* to 15 percent of all U.S. households, and cable-provided VoIP will be available to another 22 percent of U.S. households by the end of 2004.[88] ALTS entirely ignores the cable VoIP services that will soon be available to virtually every U.S. household.[89]

Finally, ALTS argues that wireless competition doesn't count because "the largest wireless carriers capable of providing intermodal competition are affiliates under the control of the RBOCs."[90] But the two largest BOC wireless affiliates compete nationwide – *i.e.*, in the markets served by each others' wireline affiliates, and one to three additional wireless providers offer service in the vast majority of markets.[91]

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[84] *See id.*; *Fact Report* at II-19.

[85] Pelcovits/Baseman Paper at 9-11.

[86] *See Fact Report* at II-20.

[87] ALTS 11/8/04 Ex Parte at 8.

[88] *See Fact Report* at II-1, II-7 to II-9.

[89] *See, e.g.*, C. Moffett, *et al.*, Bernstein, *Comcast (CMCSA): Management Spells Out Concrete VoIP Timeline* at 1 (Nov. 15, 2004) (Comcast showed "renewed enthusiasm for VoIP, and expects to name its first "four or five" major markets . . . in mid-February 2005 . . . We expect these markets will cover ~5M households, or ~15% of Comcast's footprint."); Cox has now launched VoIP service in five markets, up from one at the time of the Fact Report. *See* Cox Press Release, *Cox Communications Delivers Digital Telephone Service to Southwest Louisiana; Southwest Louisiana Marks 17th Telephone Market for Cox* (Nov. 15, 2004); A. Bourkoff, UBS, *High-Speed Date Update for 3Q04* at 15 (Nov. 15, 2004) ("By year-end 2004, Time Warner Cable and Cablevision should have VoIP fully deployed across their footprints.").

[90] ALTS 11/8/04 Ex Parte at 9.

[91] According to the Commission's data, for example, 97 percent of the population lives in a county served by three or more wireless operators, while 88 percent live in a county served by five or more. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Ninth Report, Appendix A, Table 5, 19 FCC Rcd 20597 (2004).